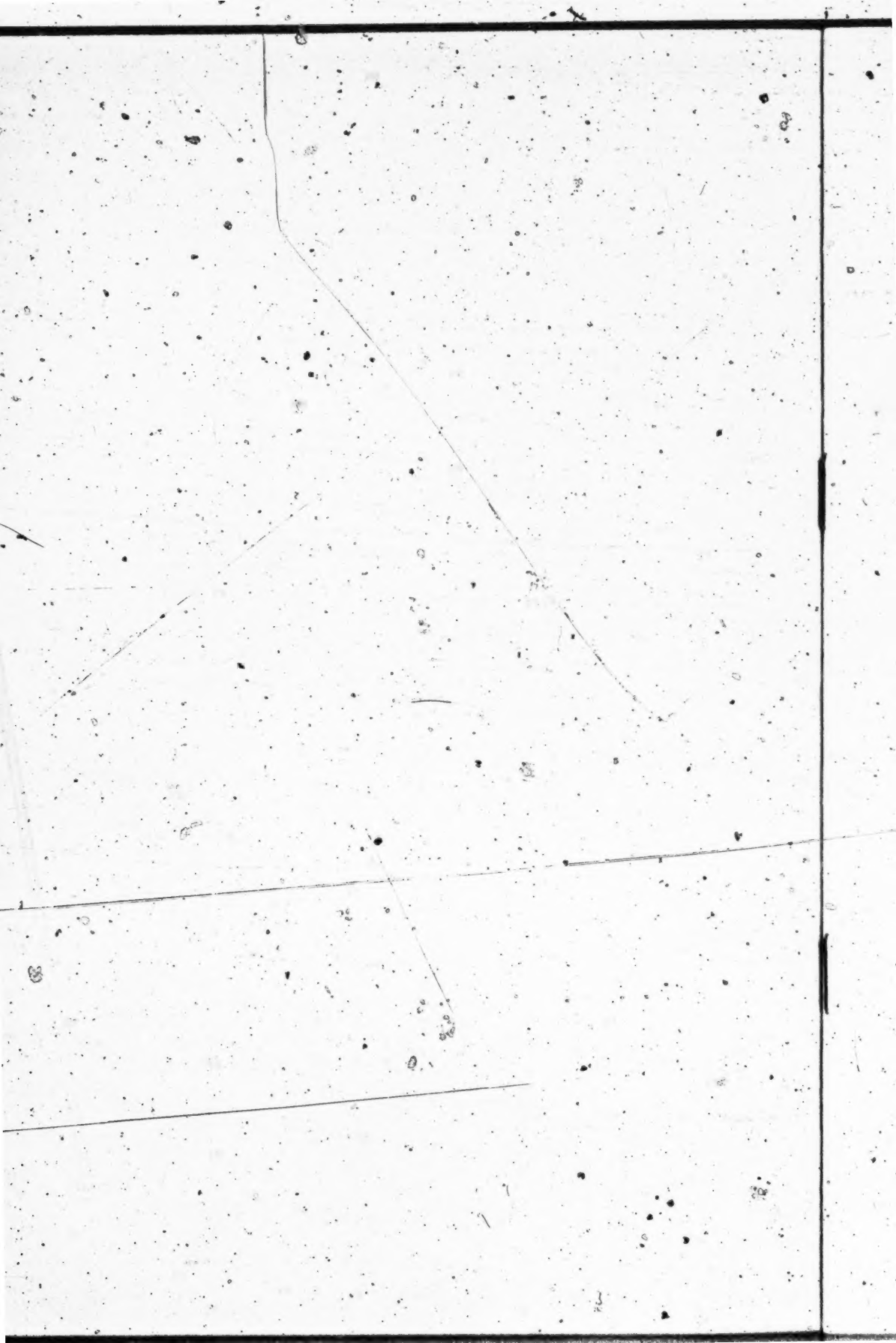


LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 14 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 611

DAVID RABECK,

Appellant,

against

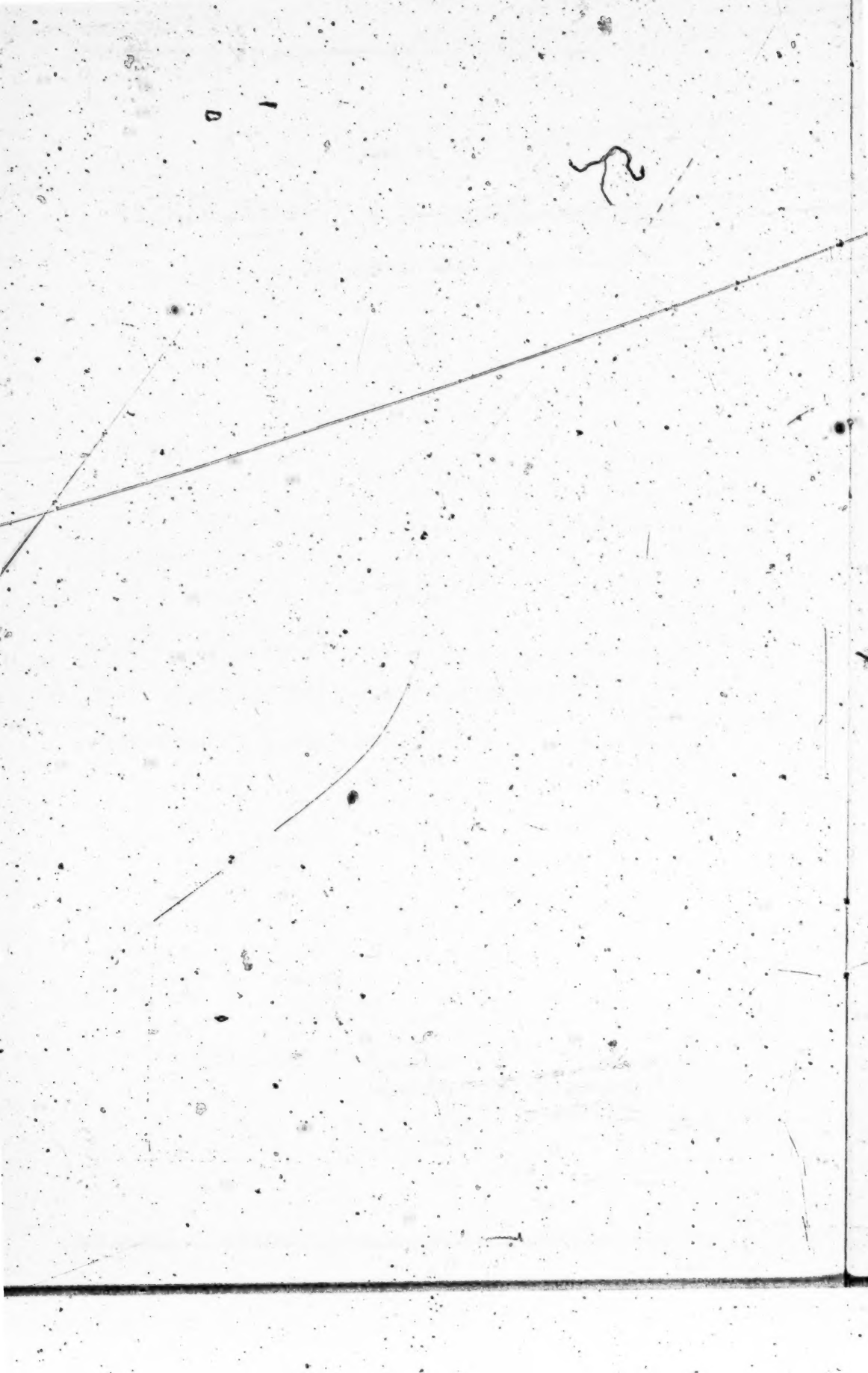
THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

ISIDORE DOLLINGER
District Attorney
Bronx County
Attorney for Appellee
851 Grand Concourse
Bronx, New York 10451

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel



IN THE

Supreme Court of the United States

October Term, 1967

No. 611

DAVID RABECK,

Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

MOTION TO DISMISS OR AFFIRM

Appellee in the above entitled case moves to dismiss or affirm on the grounds that the question presented is wholly insubstantial.

As the appellant's jurisdictional statement poses it, the only question presented for all practical purposes concerns the constitutionality of former New York Penal Law Section 484(i), upheld by a divided Court of Appeals [*People* v. *Tannenbaum*, 18 N.Y. 2d 268 (1966), appeal dismissed 388 U. S. 439, 87 S.Ct. 2107 (1967)]. That question is now utterly without importance or significance because, on Sep-

tember 1, 1967, the entire Penal Law of New York went out of existence, repealed by a revised Penal Law which took effect on that date.

The Penal Law as it existed prior to September 1st, proscribed the sale and distribution to minors of salacious materials by Sections 484(h) and 484(i). The New York Court of Appeals, in their opinion in *Tannenbaum*, noted the dual provisions in New York law on the same subject, and while the majority upheld §484(i), the entire Court appeared to favor the formulation of §484(h).

However, Section 484(i) has not been perpetuated in the new law. Instead, the substance of the old Section 484(h) was re-enacted, at which time there were also enacted provisions making it an affirmative defense that the defendant had reasonable cause to believe that the minor involved was seventeen years old or more, or that such minor had offered certain specified proofs purporting to establish that he was of lawful age (Penal Law, §§235.00 *et seq.*).

On June 12, 1967, this Court noted probable jurisdiction in a case wherein the constitutionality of the old §484(h) was challenged, as a result of which action it now appears that this Court has already a vehicle for resolving the issues sought to be presented herein [see *Ginsberg* v. *New York*, October, 1966, No. 1022, 388 U. S. 904, 87 S.Ct. 2108].

Under those circumstances, the instant case hardly presents a question of sufficient importance for this Court to hear or determine; it has no importance for New York, which has already revised its statutory scheme, and because of the peculiar framing of the pertinent statute, little if any importance for other jurisdictions.

Furthermore, while we are not unmindful of the views expressed by the dissenting members of this Court in *Tannenbaum*, we respectfully submit that for Mr. Rabeck, the case is of minor importance. Indicative is the fact that he makes no effort now to demonstrate that his present exposure to a reconsideration of the sentence—a six-month jail term, execution of which was suspended [N.Y. Code Crim. Proc., §470-a]—is anything more than a theoretical threat. Similarly, no effort presently is made by Mr. Rabeck to show that collateral disabilities will result from his conviction.

WHEREFORE, it is respectfully prayed that the appeal be dismissed or the judgment summarily affirmed.

Respectfully submitted,

ISIDORE DOLLINGER
District Attorney
Bronx County
Attorney for Appellee

DANIEL J. SULLIVAN
Assistant District Attorney
Of Counsel

Dated: Bronx, N. Y.
October, 1967.